Supreme Court, U.S.
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No. 99-251

In the Supreme Court of the United States

GARY DAVIS,

Petitioner,

v.

GEORGIA NUNEZ,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Throughout this Petition, Ms. Nunez will be identified as "Nunez." The Respondent, Gary Davis, will be identified as "Davis." Davis was a judge at the time these events took place. The City of North of Las Vegas, a former Defendant, was dismissed before trial. Other than these parties, no other parties to the proceeding, parent companies, or non-wholly owned subsidiaries are known or identified.

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STATEMENT OF THE CASE

The petition is seeking this Court's review of the Ninth Circuit's opinion concerning (1) the violation of 42 U.S.C. § 1983 when the facts show that Nunez's conduct was constitutionally protected speech (2) and the qualified immunity defense when the basis for such a defense was never established. As detailed below, there is no cause for this Court's review of these issues because Nunez's speech, consistent with this Court's decisions and other federal courts of appeals, show that Nunez's speech was a particularized message communicated clearly to others and touched on a matter of public concern There was no disagreement on general matters of court policy. Therefore, her speech was protected symbolic speech. The district court properly determined that it was a material and substantial factor considered by Davis in his decision to dismiss Nunez after 21 years of service.

Davis also fails to address other significant facts considered by the lower courts. This evidence included testimony that there was no disruption of the court system; Davis' own proffered reasons to Nunez concerning leaves by the back door, ceiling tiles in need of repair, and failure to obtain the full amount of the raise he wanted. He never told her it was because of the backlog or the need for clerks to remain in the office.

Furthermore, Davis omits the fact that counsel testified that Davis had never told counsel about his statement that no one would receive perks of employment unless they helped on his campaign, or the reason of the alleged "backlog," or the need to retain the clerks to maintain court functioning. Therefore, no basis existed on which to

base the application of qualified immunity or giving the qualified immunity instruction to the jury. Davis was aware of the wrongfulness of his actions when he testified at trial that he said it but didn't mean it. No employees knew that he didn't mean it.

Stating that there were "plainly wrongful jury instructions," "mis-characterization of facts of insubordination and disruption as protected speech" and "refusal to recognize the hallowed doctrine of qualified immunity" fails to address an accurate description of the underlying facts. Davis has distorted the underlying facts of this case and to that extent they are restated here. Based on those facts as applied to relevant decisions of this Court and other federal courts of appeal, there are no conflicts and there is no departure from the usual and accepted course of judicial proceedings.

I. PROCEDURAL HISTORY

The Court of Appeals for the Ninth Circuit held that Nunez's conduct implicated the First Amendment. Furthermore, with regard to its submission as a jury question, the Ninth Circuit in a footnote specifically stated that the district court had "implicitly held that Nunez's speech involved a matter of public concern when, in denying Davis' motion for judgment as a matter of law, the court noted that 'the government has no interest in the chilling of an employee's political expression.'"[1]

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[1] *See* Petitioner's Appendix at pp. 3-4.

The petition misrepresents the facts which were presented before the district court concerning qualified immunity. The district court did consider qualified immunity as a jury instruction and determined that based on the facts, it was not an available defense. Davis admitted that he had given the instruction that no perks would be allowed to employees who did not work on his campaign. This issue was based on that court's finding that "there was sufficient evidence for a reasonable jury to find plaintiff's attempts to protect the First Amendment rights of two court employees under her supervision from the unconstitutional coercion by defendant of withholding perks from them if they did not support his election campaign was a material and substantial factor in his decision to fire the plaintiff and therefore a violation of 42 U.S.C. § 1983."[2] His proffered reasons were simply not credible and merely pretextual. Davis could not have reasonably believed that Nunez's dismissal was proper. That being so, there was no basis to provide such a jury instruction on this issue.

II. STATEMENT OF THE FACTS

To the extent that Davis' statement of facts is incomplete, Nunez states additional facts herein:

At trial, Davis stated that he had told employees that he would not provide perks if they had not assisted him on his re-election campaign. This was well-known in the workplace. Then he testified at trial that he "did not mean it." However, co-workers were always well aware of

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[2] *See* Petitioner's Appendix at pp. 18-19.

his threat to deny perks to employees who did not assist him on his campaign. Nunez, a 21-year employee, testified to his visible anger when she had advised him that she had allowed two clerks to attend a certain seminar. These two clerks had not assisted Davis in his reelection campaign. Testimony was that Davis advised counsel for the City of North Las Vegas, City Attorney Richard Maurer, of his intent to dismiss Nunez. However, even Mr. Maurer himself testified that he was never aware of Davis' instruction that any employee who did not assist him on his campaign would not receive perks of employment. Of further significance was Davis' testimony concerning his stated reasons to Nunez after he learned that two clerks, who had not helped on his campaign, had attended a seminar, a benefit of employment. These reasons were that she had "failed him." He suddenly mentioned ceiling tiles that Nunez had not changed, a build-up of fallen leaves by the back door, and that she had been unsuccessful in obtaining a $7,500 raise for him. (The City of North Las Vegas had only approved a $5,000 raise, not $7,500 as Davis had desired). Her job description did not include physical site maintenance or landscaping.

These reasons were pretextual. Because Nunez's speech was never given as a reason to Mr. Maurer, it was *not* reasonable for Davis to rely on the advice of Mr. Maurer. Therefore, the decision of the Ninth Circuit is consistent with *Hyland v. Wonder,* 117 F.3d 405 (9th Cir. 1997), *cert denied,* 118 S.Ct. 1166 (1998).

Even though "backlog" may have been the reason provided by Davis at trial, Nunez and other witnesses tes-

tified that the backlog was insignificant and was even artificially created by Davis. In addition, Nunez testified that she had been allowed in the past to determine the clerks allowed to go on a seminar. Davis was not so involved.

LEGAL ARGUMENT AGAINST ISSUANCE OF A PETITION

Petitioner Davis refers to "glaring flaws" in the decision of the Ninth Circuit. Yet, Petitioner has failed to show that there was any incorrect application of the established law. Indeed, when all facts are reviewed, it is clear that the Ninth Circuit correctly applied the standards as in the decisions of this Court and those within the Ninth Circuit and other courts of appeal. Furthermore, no conflict among the circuits is even alleged, only an alleged misapplication of facts as Petitioner would want this Court to review, rather than facts actually brought before the district court and Ninth Circuit outlined herein.

A. THE PETITION MISREPRESENTS THE FACTS CONSIDERED BY THE LOWER COURTS WHICH ESTABLISH THAT NUNEZ'S SPEECH WAS FIRST AMENDMENT SPEECH.

The Ninth Circuit has correctly held that Nunez's conduct was constitutionally protected speech and, furthermore, that it was the substantial and motivating factor in her termination. Because the jury did not believe the pretextual reasons provided by Davis, the decision was proper.

The Ninth Circuit was well aware that the district court had implicitly found that Nunez's speech was constitutionally protected, and was a substantial or motivating factor in her termination. This was a correct determination and no conflicts within this Court, the Ninth Circuit, or with other federal courts of appeal are found. It was simply not believed that Davis would have taken that same action of termination even in the absence of her allowing two clerks to have perks or benefits of employment—clerks who did not assist him on his campaign. There should be no coercion by Davis of withholding perks from them if they did not support his election campaign.

The evidence at trial revealed both to the district court and the Ninth Circuit that there was no credible version of the facts as provided by Davis. The court functioned no differently and other witnesses corroborated Nunez that there was no interference with the proper functioning in the workplace. There was no insubordination or even any reasonable threat of any insubordination. Even the example provided by Davis in a footnote[3] does not apply to the facts as in the present case. Nunez did not say "no" to any request to perform a lawful task within the scope of her duties. She merely performed her duties as she had always done—selecting employees eligible to attend the seminar. It would not have been lawful for her to deny this benefit of employment to these employees because they did not assist Davis in his campaign. There was no backlog of which to be concerned. Other employees as-

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[3] *See* Petition at p. 13, fn 10.

sisted her in the selection process and they likewise testified to no interference.

Davis' reliance on *Kotwica v. City of Tucson*, 801 F.2d 1182 (9th Cir. 1986) is consistent with the decision in the present case. In that case, an employee was disciplined for refusing to obey orders. Nunez did not fail to follow orders. It was within her job description to select clerks to attend this annual seminar. She did not just "think," as Davis presents to this Court, that Davis' decision to not allow the two clerks to attend the seminar was premised upon not supporting his campaign. He had actually said that and admitted at trial that he had said it. She had advised him of its wrongfulness.

The Ninth Circuit's ruling is also consistent with *Johnson v. Multinomah County, Oregon*, 48 F.3d 420 (9th Cir. 1995) in that Nunez's conduct involved a matter of public concern since it related to a "matter of political, social, or other concern to the community." In this instance, in particular there should be no coercion of an employee to work on a campaign as Davis attempted to do. This conduct is further consistent with *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 74 L.Ed.2d 708 (1983). Based on Davis' own admission that no perks would be allowed to employees who did not assist him on his campaign, Nunez's behavior cannot be said to be "so insubstantial." This is not merely addressing the issue on the "wisdom of a personnel decision." When reviewed with regard to the "content, form, and context" of her statement, it is clear that this was not an issue of "some purely, private interest" as in *Smith v. Fruin*, 28 F.3d 646 (7th Cir. 1994). By her action, Nunez was bringing wrongdoing to light—

she was allowing employees who did not assist Davis in his campaign to go to a seminar. This action spoke loudly to all in that workplace that an employee's refusal to assist on the reelection campaign would not bar them from receiving any benefits of employment. There was no private interest involved. It involved all of those who worked within the City of North Las Vegas court system of which Nunez was the Court Administrator. She was safeguarding the rights of employees with regard to their assistance to an elected official in coercing them to work on a campaign. It was an issue of public concern as well because it involved the reelection of a municipal court judge.

The ruling of the Ninth Circuit is also consistent with the rulings of other federal courts of appeal in that her conduct addressed more than any "personal effect upon employees." *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997); *Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215 (7th Cir. 1994). It clearly addresses issues of political significance, one which employees should not be compelled to comply or risk the loss of benefits. Nunez clearly went public since all employees were well aware of Davis' instruction that no perks (employment benefits) would be given to employees who did not work on his campaign. It was not insubordinate behavior. It was protected speech. No words could have spoken louder than her action to protect the employees under her supervision.

Because Davis has failed to address any conflict with any United States Supreme Court decision or within the Ninth Circuit or with other federal courts of appeal, there

is no "gross injustice" as he alleges occurred and his petition for writ should properly be denied.

B. BECAUSE THE DISTRICT COURT HAD IMPLICITLY FOUND THAT THE SPEECH IN WHICH NUNEZ WAS ENGAGED WAS PROTECTED OR SYMBOLIC SPEECH, IT WAS MERELY HARMLESS ERROR TO SUBMIT THE QUESTION TO THE JURY.

Petitioner Davis merely alleges "wrongful confusion" of the jury when in fact there is no basis for such an allegation. Such confusion cannot merely be alleged without any basis for same. Merely concluding that issues of fact and issues of law were presented to the jury and created confusion is not sufficient to believe that such a jury instruction was "reversible error." Even if the jury instruction on the issue of law was given, it fails to become a "reversible" error simply by the allegation, without evidence of same, that there was "wrongful confusion." Davis should not be allowed to engage in such a baseless allegation and conclusion.

Again, Davis fails to show any conflict within the courts concerning this issue. Furthermore, Davis alleges that the *Pickering* analysis was conducted by the jury. However, the district court conducted the same analysis and found that there was a First Amendment violation and that it was the material and substantial factor in Davis' decision to dismiss Nunez. In *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), this Court stated that the First Amendment rights of government employees depend on the "balance between the interests of the [employee], as a citizen, in commenting upon matters of

public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

The evidence revealed that Davis' allegation of concern with the efficiency of public services was not credible. Based on the testimony of several employees, there was no inefficiency or disruption. Furthermore, this Court has further stated that "[i]n many such situations the government may have to make a substantial showing that the speech is, *in fact*, likely to be disruptive before it may be published." *Waters v. Churchill,* 511 U.S. 661, 674, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686 (1994). In the present case, there was no substantial showing that Nunez's speech would, *in fact*, likely be disruptive. The lower courts' decisions certainly satisfied the *Pickering* analysis particularly in light of the lack of any disruption to the workplace. There is no conflict with *Pickering* or *Waters*.

In addition, Petitioner Davis focuses on erroneous facts. By alleging that because, "in Nunez's mind," she was engaging in acts of civil disobedience on issues of public concern, her conduct became speech. This was clearly not just "in Nunez's mind." Davis clearly gave the instruction that those who did not help on his campaign would not be allowed any perks or benefits of employment.

Without any credible evidence of insubordination, this case is clearly distinguished and consistent with *Moran v. State of Washington,* 147 F.3d 839 (1998). In that case, the decision of the insurance commissioner was upheld in the termination of the state's deputy commissioner. Of significant distinction was that the employee was in-

volved in policy-making and her policy-making views differed with those of the insurance commissioner. Implementation of policy was critical to her position, unlike Nunez's position which was an administrative task of selecting employees to attend a seminar. Furthermore, in the present case, a municipal court judge is involved—an employer who should be above reproach and for whom the public should place its trust and who should not use his office to advance his own private interests.

Finally, as shown herein, the Ninth Circuit's ruling is indeed consistent with this Court, other Ninth Circuit decisions, and those of other federal courts of appeal. It was not blatant error since the district court in its own order did decide the issue that Nunez's conduct was constitutionally protected speech. The Ninth Circuit has indeed upheld the lofty goals of the First Amendment. The petition for writ should therefore be denied.

C. BECAUSE NUNEZ ENGAGED IN PROTECTED SPEECH AS DETERMINED BY THE COURT AND WHICH WAS ALSO A MATERIAL AND SUBSTANTIAL FACTOR IN DAVIS' DECISION TO DISMISS HER, HER DISMISSAL WAS UNJUSTIFIED.

Petitioner Davis addresses the facts in a distorted fashion such that his petition fails to address relevant facts addressed by both the district court and the Ninth Circuit. The petition fails to inform this Court of the bogus reasons Davis did indeed provide to the City Attorney. None of those reasons ever included the alleged "backlog" or reference to Nunez's decision in the selection of clerks to attend seminars as testified to by the City Attorney. Simply put, the material and substantial factor

in Nunez's termination was that she had allowed two clerks to attend the seminar—two clerks who had not helped on Davis' reelection campaign. Nunez testified that only then did Davis become angry. Other employees knew as well of Davis' instruction. By her engaging in her position to decide the law clerks to attend this seminar, she had engaged in political speech showing all employees that Davis' instruction would not interfere with their entitlement to employment benefits based on whether they worked on his campaign or not.

D. DAVIS FAILS TO ACCURATELY DESCRIBE THE EVIDENCE AND TESTIMONY BELOW REGARDING THE DISTRICT COURT'S PROPER RULING THAT THE QUALIFIED IMMUNITY DEFENSE WAS NOT PROPER FOR THE JURY TO CONSIDER.

The petition's description of facts stating only that Davis spoke to an attorney fails to provide this Court with an adequate description. It omits several pertinent facts. In *Burk v. Unified School District No. 329*, 646 F. Supp. 1557 (D. Kan. 1986), the issue is whether complete information had been provided to the advising attorney. *First,* contrary to the implication in the petition, the attorney from whom Davis sought advice testified that Davis did not tell him that he (Davis) had told employees that they would not receive perks if they did not assist him on his campaign. Had he divulged this very fact to Mr. Maurer, it may be reasonably inferred that he might have been told differently. Mr. Maurer testified that he did not recall that fact and further stated that nothing Davis said raised any issues concerning illegal termination. It may be reasonably inferred that Davis purposely

refrained from informing Mr. Maurer about that fact, the true motivating factor in his decision. Davis knew very well that his conduct was in violation of the rights of his employees. After all, he "didn't mean it." There was no mistaken judgment here, nor was there any "reasonable error." This is consistent with *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Qualified immunity only applies when there is a "reasonable error" on the part of the government official. It is not available to the "plainly incompetent" or "those who knowingly violate the law." In the present case, because Davis withheld information there is no basis on which he could "reasonably believe that his conduct was lawful." *Knox v. Southwest Airlines*, 124 F.3d 1103 (9th Cir. 1997); *Romero v. Kitsap County*, 931 F.2d 624 (9th Cir. 1991).

The decisions relied upon by Petitioner Davis fail to address the facts at issue here. In *Branti v. Finkle*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), the issue of party affiliation does not apply in the context of a judge's reelection campaign. There is no concern with "political loyalty" or basis for the justification to rely on political considerations or affiliation. Nunez, an employee of over 20 years, including 14 years with Davis, had shown her loyalty and fulfillment of her job duties. To find otherwise would result in every employee being fired if he or she refused to work on a judge's campaign, when such allegiance is not relevant to the fulfillment of their administrative duties (not policy-making). Forcing employees to work on a political campaign or be retaliated against must not and should not be an appropriate requirement for the effective performance of any court

position within the municipal court system. There is no conflict here.

In *Moran v. State of Washington*, 147 F.3d 839 (9th Cir. 1997), the Ninth Circuit addressed both issues of First Amendment speech and qualified immunity. The court recognized that the qualified immunity "defense" has been defined quite broadly: "[I]t provides ample protection to *all but the plainly incompetent or those who knowingly violate the law.*" Id. at 844 (emphasis added). In the present case, Davis was well aware of his wrongdoing. By failing to disclose any alleged backlog to the City Attorney he was only attempting to veil his actions under the cloak of qualified immunity and should not be permitted to do so. The petition alleged no confusion or conflict in the lower courts about *Moran's* meaning or application. There is thus no cause for this Court's review.

In addition, the decision below was plainly correct in light of *Moran*. The petition merely alleges that Davis lost confidence in Nunez and fails to address the other bogus reasons. Such an omission distorts the relevant facts considered by the lower courts.

Moreover, Petitioner Davis' claims are likewise meritless to the extent they are based on his own view that the speech in which Nunez engaged in was not communicated to other employees. This issue was addressed by the Ninth Circuit as well and is supported by other decisions that her conduct was a means of communication. It is about Nunez's concern for the employees that they not be compelled to do what they did not want to do, i.e., work on Davis' campaign. Everyone knew in the

office that these two clerks would be attending the seminar. The petition distorts the underlying facts when it fails to address the fact that one of the clerks who was selected to attend the seminar was surprised because she had not helped on Davis' campaign. It was not secretive. Nunez was sending the message: there would be no oppression of employees' First Amendment rights; that Davis' admonition, his intimidation and coercion, would not be tolerated.

It was a particularized message as well. The likelihood was great and in effect was understood by all employees. The petition's assertion that this is not protected speech fails to address any conflict with other federal courts of appeal and this Court. The Ninth Circuit's decision was a plainly correct application of *Connick v. Myers*, 103 S.Ct. 1684 (1983) and *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). The facts presented showed that there was no insubordination. There was no inefficiency in the services provided by the Court. There was no disruption against which any harm could be measured. Loss of "personal loyalty and confidence" were determined by the district court as well as by the Ninth Circuit, based on the evidence and testimony, and *not* the criteria used by Davis. Therefore, no conflict with *Moran* or *Connick* or *Pickering* is shown. The Ninth Circuit correctly applied these decisions to the facts herein. The petition should be denied.

CONCLUSION

Petitioner Davis has failed to show any conflict with the application of this Court's decisions as well as those within the Ninth Circuit and other federal courts of appeal; he has also failed to show any departure from the accepted and usual course of judicial proceedings; and he has failed to show any conflict involving an important federal question. Therefore, the petition should be denied.

Respectfully submitted,

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